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IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA.

No. 7,466

GOVERNMENT AND CIVIC EMPLOYEES ORGANIZING COMMITTEE, C. I. O., AN UNINCORPORATED ASSOCIATION, E. J. HABSHEY,

Plaintiffs,

vs.

S. F. WINDSOR; FELIX L. PARSONS; J. T. THROWER; WILLIAM K. THAMES; MAURY A. McWILLIAMS; AND R. P. McREE.

STATEMENT AS TO JURISDICTION

Filed November 18, 1953

In compliance with Rule 12 of the Rules of the Supreme Court of the United States, as amended, appellants (plaintiffs below) submit herewith their statement particularly disclosing the basis upon which the Supreme Court of the United States has jurisdiction on appeal to review the judgment of the District Court entered in this cause.

Opinion Below

The opinion of the District Court for the Northern District of Alabama, Southern Division, was rendered on November 9, 1953. A copy of the opinion and order of the Court, entered the same day, are attached hereto as Appendix A.

Jurisdiction

Appellants sought an injunction against enforcement of a Statute of the State of Alabama. This suit was heard and determined by a District Court of three judges, as provided for in Title 28, United States Code, Section 2284. The order and judgment of the Court, denying relief, were entered on November 9, 1953. A petition for appeal is presented herewith, to-wit, on November 18, 1953, to one of the Judges of the said Court. The statutory provision which sustains the jurisdiction of the Supreme Court to review this decision by direct appeal is Title 28 of the United States Code, Section 1253, reading:

> "Except as otherwise provided by law, any party may appeal to the Supreme Court from an order granting or denying, after notice and hearing, an interlocutory or permanent injunction in any civil action, suit or proceeding required by any Act of Congress to be heard and determined by a district court of three judges."

Questions Presented

An Alabama statute forfeits all employment rights of a clerk in a State operated retail liquor store, solely because he "joins or participates in . . . or remains a member of of labor organization." Does that Statute require construction by Alabama's courts before Federal jurisdiction should be exercised to enjoin its enforcement as violative of the Fourteenth Amendment? Can a State, consistently with the Fourteenth Amendment, exclude such a public servant from further public employment solely because of such membership or participation in a labor union not found by the Legislature to have any particular potential for evil? Absent any issue as to loyalty, past or present, does constitutional protection extend to a public servant whom State legislation seeks to exclude from employment in a State

liquor store because of membership or participation in a labor union, where such exclusion is not directed at any insistence by government employees on the right to strike or to bargain collectively, but is designed to forfeit public employment rights solely because of such membership or participation?

Statutes Involved

The Alabama Statute involved in this case (Act No. 720, Acts of 1953, the so-called "Solomon Bill" and hereinafter referred to as the "Statute") is attached hereto as Appendix B.

Statement

Appellants contend that the Fourteenth Amendment is violated by the Statute which provides, with certain exceptions, that any employee of the State who joins a labor union or labor organization, or who remains a member of, or who participates in any such organization, shall automatically forfeit all of his employment rights, benefits and privileges.

The individual plaintiff is a clerk in a retail liquor store operated by the Alabama Alcoholic Beverage Control Board. He is a member of the plaintiff union. Under the Statute in issue, he is threatened with discharge and loss of all of his employment rights, privileges and benefits because, and solely because, he intends to remain a member of the Union.

The union plaintiff is the Government and Civic Employees Organizing Committee, CIO, a labor organization composed of the employees of governmental and civic agencies who have organized together for their mutual aid and protection. The union includes members, such as the individual plaintiff, who are employed by agencies of the State of Alabama and it is engaged in recruiting additional members among such agencies.

B.

The Statute and its threatened enforcement by appellees have caused many members to resign from plaintiff unions and many potential members to refrain from joining. Members of the union have thus been deprived of the benefits which can only be achieved for them by the union when a substantial number of employees are members, and, further, the union has been deprived of both the dues which members of the union pay in order to support its activities and an organizational investment in excess of Three Thousand Dollars ($3,000.00).

There is no issue here as to loyalty, either past or present. Cf. *Garner* v. *Los Angeles Board,* 341 U. S. 716. Plaintiff union is not a subversive organization, and the Statute embodies no legislative finding that it is. This union's rolls are specifically closed to any "fascist, communist, or person advocating the overthrow of government by force and violence."

There is no issue as to work in a "sensitive area", such as a schoolroom. Cf. *Adler* v. *Bd. of Education,* 342 U. S. 485. Teachers are, in fact, excepted from the Act, which, apart from such exceptions, applies to all employees of the State. Nor is there any issue as to the right of State employees to strike or to bargain collectively since the Statute makes forfeiture of public employment rights dependent solely on membership (or even participation without membership) in any labor organization, however restricted its activities may be.

The Three Judge District Court below denied an injunction against the Statute's enforcement and refused to declare it violative of the Fourteenth Amendment. That Court was satisfied of its jurisdiction and that the bill had equity, but felt constrained to apply the doctrine of abstention until construction of the Statute could be had in

the courts of Alabama. No relief pending proceedings in the State Courts was granted.

Forfeiture of employment rights under the Statute is, however, mandatory; there is, therefore, no possible question of exhaustion of administrative remedies. The only relevant consideration in any procedure conceivably made available by Alabama would be whether the individual employee is a member of or participates in a union. The individual plaintiff admits that he is a member of the union and intends to remain a member.

Actually, the Statute provides no administrative or statutory remedy. Alabama's Legislature has used unmistakably simple, clear and mandatory language. The Statute is as plain and as certain as our language can make it; there is no occasion for construction. By operation of the Statute itself, the individual plaintiff forfeits "all rights afforded him under the State Merit System, employment rights, reemployment rights and all other rights, benefits, or privileges which he enjoys as a result of his public employment." Without the immediate protection of a court of equity, he is helpless. Any right of appeal through the State Merit (civil service) System that he may formerly have had is now forfeit. His discharge and the forfeiture of all his public employment rights (including the right to work, seniority, promotion, vacation, classified status, retirement, etc.) are required solely because he continues his union membership. In this posture of the case, with the meaning of the challenged Statute patently clear, "there is neither need for interpretation of the statute nor any other special circumstances requiring the Federal Court to stay action, pending proceedings in the State Courts."

Toomer v. *Witsell*, 334 U. S. 385, 392, fn. 15, 68 S. Ct. 1156, 1160, fn. 15.

"Since [the plaintiff] admits that he violated the rule against [union membership] and that removal from office is therefore mandatory under the Act, there is no question as to the exhaustion of administrative remedies."

United Public Workers v. *Mitchell*, 330 U. S. 75, 93.

The Court below, retaining the bill of complaint, abstained from exercising its jurisdiction until there is some construction of the Statute by the State, but there is no area of uncertainty or ambiguity which could possibly eliminate the damage to the plaintiffs.

Certainly, there is no State administrative proceedure and no posible interpretation of the Statute which would avoid the continuance of immediate and disastrous damage to the union plaintiff.[1]

The Judicial Code grants to litigants, in a case such as this, the right to have their constitutional rights determined and protected in a Federal forum. On the balance of all considerations, the exercise of Federal judicial power here would meet the traditional standards of access to Federal courts without violation of the doctrine of comity between Federal and State courts.

That is particularly so because the Statute in question, upon its face and as appellees threaten to apply it to appellants, so clearly violates the Fourteenth Amendment.

C.

State legislation cannot limit or destroy rights of public employees to free speech, free inquiry, free press, free petitions, and free assembly. Membership and participation in voluntary associations, such as labor unions, equate to

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[1] Cf. *Columbia Broadcasting System* v. *United States*, 316 U.S. 407, 417, 418; 62 S. Ct. 1194, in which it was "not certain whether the Commission will institute proceedings to enforce the penalty incurred under its regulations."

the realistic and effective exercise of these rights. To prohibit such membership and participation is largely to destroy them.

Union meetings, thus exist "in the best American tradition" of mutual assembly, consultation and discussion.

Cf. Jackson, J., concurring, *Thomas* v. *Collins*, 323 U. S. 516, 546, 65 S. Ct. 315, 330.

Here, there is no problem of protecting the public safety and security against disloyalty of public servants. Even were that question present, the State nevertheless would be required to act "without infringing the freedoms that are the ultimate values of all democratic living."

Wieman v. *Updegraff*, 344 U. S. 183, 73 S. Ct. 162, 165.

Public employees may in some circumstances be excluded from public employment on disloyalty grounds. But such employees—absent any question of their loyalty—enjoy all the constitutional rights guaranteed by the Due Process Clause. They cannot be removed from public employment in violation of those basic rights.

Wieman v. *Updegraff*, *supra*.

Public employees enjoy constitutionally protected rights to participate in lawful associations, to worship freely and to speak and read. Those activities, unlike acts of disloyalty, are not inimical to the interests of the public service. Governmental action that requires a forfeiture of such rights, violates the Due Process Clause of the Fourteenth Amendment.

Id.

The Alabama Statute before this Court is "incompatible with an exercise of the rights of free speech and free assembly. Lawful public assemblies, involving no element

of grave and immediate danger to an interest the state is entitled to protect, are not instruments of harm. . . . And the right either of workmen or of unions under these conditions to assemble and discuss their own affairs is as fully protected by the Constitution as the right of businessmen, farmers, educators, political party members or others to assemble and discuss their affairs and to enlist the support of others."

Thomas v. *Collins*, 323 U. S. 516, 539, 65 S. Ct. 315, 327.

Adler and United Public Workers v. *Mitchell*, 330 U. S. 75, 67 S. Ct. 556, held that public employees in the peculiarly sensitive area of a school system must work upon reasonable terms laid down by the proper authorities. But, it did not hold "that there is no constitutionally protected right to public employment."

The Bill of Rights and the Due Process Clause of the Fourteenth Amendment do not except public employees. As this Court has made clear:

> "For, *in United Public Workers*, though we held that the Federal Government through the Hatch Act could properly bar its employees from certain types of political activity thought inimical to the interests of the Civil Service, we cast this holding into perspective by emphasizing that Congress could not 'enact a regulation providing that no Republican, Jew or Negro shall be appointed to federal office, or that no federal employee shall attend Mass or take any active part in missionary work.' 330 U. S. at 100. See also Re Summers, 325 U. S. 561, 571 (1945). We need not pause to consider whether an abstract right to public employment exists. It is sufficient to say that constitutional protection does extend to the public servant whose exclusion pursuant to a statute is patently arbitrary or discriminatory." *Wieman* v. *Updegraff*, 344 U. S. 183, 191-192, 73 S. Ct. 162, 167.

Elaborate citation of authorities is not necessary to delineate the degree of equal treatment required by the equal protection clause of the Fourteenth Amendment. The Lgislature of a State has power to pass laws which make appropriate classifications based on reasonable and relevant differences. No such differences are present here.

The Statute does not deny benefits to employees of the Alcoholic Beverage Control Board because they are members of such undesirable organizations as the Communist Party, the Nazi Party, or the Ku Klux Klan. The Statute does not deny benefits to those who are members of such lawful organizations as the Chamber of Commerce, a farm cooperative, a church, a missionary society or a political party. (Nor, indeed, does it apply to certain State agencies in which the employees have been organized into unions affiliated with the American Federation of Labor and the Railroad Brotherhoods.) Thus, only labor unions—in fact, only some labor unions—are subject to the regulations and restrictions imposed by the Statute. As applied to these plaintiffs, and upon its face, this legislation represents both a patent denial of equal protection of the laws, and a violation of the Due Process Clause.

The Questions Presented Are Substantial

This appeal concerns a type of state legislation that has, as this Court has recently noted, public importance and presents recurring serious constitutional questions.

Wieman v. *Updegraff, supra,* at 186; 217.

A decision by this Court in the present case will remove any uncertainty as to the constitutional protection of public servants spelled out in *Wieman* v. *Updegraff, supra.* This Statute is directed solely against membership in a labor union and, is without ambiguity or elaborateness, designed to obliterate the rights of free speech, free asso-

ciation and free assembly that find effective expression in such organizations.

These rights, and the cognate civil rights of freedom of religion and of the press, lie at the basis of our free society. Erosion of those rights must be stopped wherever it appears. It cannot be stopped by judicial refusal to act, as reflected in the order and judgment of the Court below. That Court has refused to submit simple, unambiguous legislative language to the test of the Federal Constitution, and has denied relief against enforcement of a clearly unconstitutional Statute, even pending this appeal.

Therefore, appellants respectfully submit that the Supreme Court of the United States has jurisdiction of this appeal.

Respectfully submitted,

ARTHUR J. GOLDBERG,
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THOMAS E. HARRIS,
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COOPER, MITCH & BLACK,
By JEROME A. COOPER,
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APPENDIX "A"

OPINION OF THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ALABAMA

No. 7,466

GOVERNMENT AND CIVIC EMPLOYEES ORGANIZING COMMITTEE, CIO, AN UNINCORPORATED ASSOCIATION; E. J. HABSHEY,
Plaintiffs,

vs.

S. F. WINDSOR; FELIX L. PARSONS; J. T. THROWER; WILLIAM E. THAMES; MAURY A. McWILLIAMS; AND R. P. McREE,
Defendants

Before RIVES, Circuit Judge; LYNNE and GROOMS, District Judges

GROOMS, *District Judge:*

OPINION

This action is for an injunction and declaratory judgment. Jurisdiction is invoked under 28, U. S. C. A., Sections 1331, 1343, and 2201. Since the injunction sought is to restrain the enforcement, operation and execution of a statute of the State of Alabama, this Court is convened pursuant to Title 28, U. S. C. A., 2284. The statute involved is House Bill 231, known as the "Solomon Bill".[2] This statute became effective on September 18, 1953.

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[2] BE IT ENACTED BY THE LEGISLATURE OF ALABAMA:

Section 1. As used in this act the term "labor union or labor organization" means any organization of any kind, in which employees participate for the purpose of dealing with one or more employers concerning grievances, labor disputes, wages, rates of pay, hours of employment, or conditions of work; and the term "public employee" means any person whose compensation is derived in whole or in part from the State, or any agency, board, bureau, commission or institution thereof.

Section 2. Any public employee who joins or participates in a labor union or labor organization, or who remains a member of, or continues to

By stipulation, the case is submitted for final decree upon the pleadings, affidavits, and testimony taken orally.

This action is filed by the Government and Civic Employees Organizing Committee, CIO, an unincorporated association and E. J. Habshey, a clerk employed at Alabama Liquor Store No. 75, Birmingham. The defendants are J. T. Thrower, who is Chairman of the Alabama Alcoholic Beverage Control Board; William K. Thames and Maury A. McWilliams, members of the Board; R. F. McRee, Administrator of the Board, S. F. Windsor, District Store Supervisor of the Board in Birmingham, and Felix L. Parsons, Store Manager of Store No. 75.

Habshey is a member of the plaintiff union and intends to remain a member and to continue to participate in its activities. He has not acquired any insurance or other financial benefits as a result of such membership.

Several days after the passage of the Solomon Bill, defendant Parsons gave Habshey and the other employees of Store 75 a copy of the Bill. They were also shown a letter from defendant McRee requesting that they read, "under-

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participate in, a labor union or labor organization thirty days after the effective date of this act, shall forfeit all rights afforded him under the State Merit System, employment rights, re-employment rights, and other rights, benefits, or privileges which he enjoys as a result of his public employment.

Section 3. This act shall not apply to persons employed as teachers by any county or city board of education or trade schools or institutions of higher learning, nor shall it apply to those employees of the State Docks Board referred to in Title 38, Section 17, of the Code of Alabama, 1940, nor shall it apply to employees of cities or counties.

Section 4. Any public employee who prior to the passage of this act or to his public employment belonged to a labor union or labor organization and as a result thereof has acquired insurance benefits or any other financial benefits may continue to participiate in such labor union or labor organization to the extent that he shall not lose any benefits thus acquired.

Section 5. The provisions of this act are severable. If any part of the act is declared invalid or unconstitutional, such declaration shall not affect the part which remains.

Section 6. All laws or parts of laws which conflict with this act are repealed.

Section 7. This act shall become effective immediately upon its passage and approval by the Governor, or upon its otherwise becoming a law.

stand," and initial one copy of the Bill. This copy was to be forwarded to Montgomery and another copy retained at the store. This appears to have been a routine procedure. On October 2, 1953, the union orally and by wire requested defendant McRee to advise it what enforcement steps the Board contemplated taking to enforce the Bill. McRee replied that he was directed by the Board to inform the union "that the Solomon Bill will be enforced by the Board in the same manner as the ABC Act or other pertinent laws." The following day defendant Windsor told representatives of the union that he was required to carry out any and all orders of the Board and Administrator McRee.

Habshey has been an employee of the Board for three years. His present salary is two hundred and ten dollars per month, and he has no other available means of making a livelihood. Union dues are two dollars monthly. The union has expended in excess of three thousand dollars, exclusive of interest and costs, in solicitation efforts and as organizational expense in organizing Board employees. Before the passage of the Solomon Bill, there were approximately eight hundred members of the union employed by the various agencies of the State. Included among these were two hundred employees of the Board. At this time there are about two hundred and fifty members in all State agencies. Many members of plaintiff union employed by the Board have withdrawn from membership since the passage of the Bill. The Board has never recognized the union.

No rules or regulations have been proposed or adopted interpreting or implementing the Solomon Bill. No directives or orders have been issued to supervisors, store managers, or other employees with regard to the administration of the Bill. The Board has adopted no specific policies concerning the Bill other than a general recognition of the duties to enforce all the laws of Alabama relating to the Alabama Alcoholic Beverage Control Board. Neither Habshey nor any other employee has been threatened with discharge or dismissal or deprivation of employee rights, benefits or privileges by reason of continued membership and participation in the plaintiff union. No inquiries or investigations have been made by or on behalf of the Board

concerning union membership. No action has been taken by the State Personnel Board or its Director whereby any employee of the Alcoholic Beverage Control Board has been dismissed from his employment or deprived of any of his rights, benefits and privileges accorded him by reason of his public employment or deprived of any of his rights by reason of his public employment in the Merit System of Alabama, because of membership in any labor union. Habshey has enjoyed full Merit System status, and except to the extent that the Solomon Bill has affected his status, presently enjoys all the rights, benefits, and privileges accorded under the Merit System.

The "forfeiture clause" by its terms was without force until thirty days after the effective date of the Bill. This action was instituted on October 7, 1953—eleven days before the expiration of such thirty-day period. No State administrative or judicial proceedings are pending and the Bill is administratively and judicially undefined.

Plaintiffs contend that the challenged statute is self-executing and that it lends itself to no possible construction other than that of unconstitutionality under the Due Process Clause of the Fourteenth Amendment. They insist that they do not have to wait longer before seeking relief in a federal court, because they think that "Alabama's Legislature has used unmistakably simple, clear, and mandatory language" and that "there is neither need for interpretation of the statute or any other special circumstances requiring the federal court to stay action pending proceedings in the state courts." *Toomer v. Witsell*, 334 U. S. 385, 392. The defendants assert among other ground that plaintiffs have not exhausted available state administrative and judicial remedies and that consequently this court, as a matter of sound, equitable discretion, should decline to exercise jurisdiction.

The Solomon Bill concerns an important area of State Administration and proclaims a broad legislative policy as to such administration. As to employees working for the State, there can hardly be any dispute that the settlement of grievances, labor disputes, wages, rates of pay, hours of employment and conditions of work are matters for the

State government to be performed through its legislative and executive departments, and are not matters for collective bargaining to be participated in by a labor union or labor organization. Section 1 of the Act defines "labor union or labor organization", and, as so defined, the Act could well be construed by the state courts simply as prohibiting a public employee from being a member of or participating in such an organization for the purpose of collective bargaining with the State and, as so construed, meet the challenge of unconstitutionality.

It is the duty of this Court, as of all other federal courts, to avoid the unnecessary decision of constitutional questions. *Alabama State Federation of Labor* v. *McAdory*, 325 U. S. 450. In the McAdory case, the Supreme Court said:

> ". . . In advance of an authoritative construction of a state statute, which the state court alone can make, this court cannot know whether the state court, when called on to apply the statute to a defined case or controversy, may not construe the statute so as to avoid the constitutional questions. For us to decide the constitutional question by anticipating such an authoritative construction of the state statute would be either to decide the question unnecessarily or rest our decision on the unstable foundation or our own construction of the state statute which the state court would not be bound to follow. *Spector Motor Co.* v. *McLaughlin*, 323 U. S. 101, 105; see also *Vandenbark* v. *Owens-Illinois Co.*, 311 U. S. 538, 543; *Huddleston* v. *Dwyer*, 322 U. S. 252. Such is not the function of the declaratory judgment" (pp. 470-471).

The exercise of jurisdiction under the Federal Declaratory Judgment Act is discretionary and not compulsory. *Smith* v. *Massachusetts Mutual Life Ins. Co.* (CA 5), 167 F. 2d 990; *Brillhart* v. *Excess Ins. Co.*, 316 U. S. 491. The remedy by injunction is likewise discretionary. *Peay* v. *Cox, Registrar*, (CA 5), 190 F. 2d 123.

Many recent federal cases reflect the doctrine of abstention whereby the federal courts "exercise a wise discre-

tion" in withholding exercise of jurisdiction. *Railroad Commission of Texas* v. *Pullman Company,* 312 U. S. 496; *Chicago, et al.* v. *Fieldcrest Dairies, Inc.,* 316 U. S. 188; *Burford* v. *Sun Oil Co.,* 319 U. S. 315; *Spector Motor Service, Inc.* v. *McLaughlin, Tax. Com.,* 323 U. S. 101; *American Federation of Labor* v. *Watson,* 327 U. S. 582; *Shipman* v. *Dupre,* 339 U. S. 321; *Alabama Public Service Com.* v. *Southern Ry. Co.,* 341 U. S. 341; *Stefanelli* v. *Minard,* 342 U. S. 117.

We will not undertake to analyze these decisions nor to quote or restate their many observations other than to consider briefly the opinion in the *Watson* case as illustrating the extent to which the Supreme Court has gone in withholding the exercise of jurisdiction. In that case, appellants sued to enjoin enforcement of the "Right to Work" Amendment of the Florida Constitution on the ground that it violated the First and Fourteenth Amendments and the Contract Clause of Article 1, Sec. 10, of the Federal Constitution, and was in conflict with National Labor Relations Act. A three-judge court, without determining whether there was equity in the bill or whether the case should be held until an authoritative interpretation of the Florida law by the Florida courts could first be obtained, proceeded at once to a consideration of the constitutional question. It held that the Amendment did not violate the several constitutional provisions and that there would be time to consider any conflict with the National Labor Relations Act, if and when it arose, since that Act and the Amendment did not on their face appear to be in conflict. The court then vacated its temporary restraining order and dismissed the bill. The Supreme Court stated that the threat to enforce the Florida law was real and imminent; that *quo warranto* proceedings had already been instituted against several of the corporations who were parties to the suit based on the fact that they had closed-shop agreements with the unions, and that appellee Watson had announced a policy to prosecute criminally all violators of the law, including appellant unions, their officers, agents, and individual members, unless they gave up their closed-shop agreements and refrained from renewing or entering into any such agreements. The

Court held that the bill had equity, but that trial court erred in adjudicating the merits of the controversy, saying:

> ". . . The crux of the matter is the allegation that there is an imminent threat to an entire system of collective bargaining, a threat which, if carried through, will have such repercussions on the relationship between capital and labor as to cause irreparable damage. We conclude for that reason that the bill states a cause of action in equity.
>
> "As we have said, the District Court passed on the merits of the controversy. In doing so at this state of the litigation, we think it did not follow the proper course. The merits involve substantial constitutional issues concerning the meaning of a new provision of the Florida constitution which, so far as we are advised, has never been construed by the Florida courts. Those courts have the final say as to its meaning. When authoritatively construed, it may or may not have the meaning or force which appellees now assume that it has. In absence of an authoritative interpretation, it is impossible to know with certainty what constitutional issues will finally emerge. What would now be written on the constitutional questions might therefore turn out to be an academic and needless dissertation." (pp. 595-596).

At the time of the decision in the Watson case, there were proceedings pending in the State court. There are no such proceedings here. However, the application of the rule of abstention is not conditioned upon the pending of a state administrative or judicial proceeding. If they were otherwise, a litigant by the mere device of selecting the federal court as his forum, could, in many cases, pre-empt the exercise of jurisdiction.

This action falls within the sweep of the *Watson* and other cases last referred to and is one in which the court should withhold the exercise of jurisdiction. However, in line with the procedure approved in several of the cited cases, the cause will not be dismissed, but will be retained and remain pending for a reasonable time to permit the exhaus-

tion of such state administrative and judicial remedies as may be available; and thereafter such further proceedings will be had as may then appear to be lawful and proper.

Done, this the 9 day of November, 1953.

RICHARD T. RIVES,
United States Circuit Judge;

SEYBOURN H. LYNNE,
United States District Judge;

H. H. GROOMS,
United States District Judge.

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ALABAMA

No. 7,466

GOVERNMENT AND CIVIC EMPLOYEES ORGANIZING COMMITTEE, CIO, AN UNINCORPORATED ASSOCIATION; E. J. HABSHEY, PLAINTIFFS,

vs.

S. F. WINDSOR; FELIX L. PARSONS; J. T. THROWER; WILLIAM K. THAMES; MAURY A. MCWILLIAMS; AND R. P. MCREE, DEFENDANTS

JUDGMENT

This cause came on to be heard on the 27th day of October, 1953, before a duly constituted district court of three judges. All parties hereto stipulated in open court for submission for final decree upon the pleadings, affidavits and testimony taken orally.

Upon review of the pleadings and proof, and the briefs of the respective parties, and in conformity with the opinion of the court contemporaneously filed herewith;

It is, accordingly, ordered, adjudged and decreed by the court that the final relief for which plaintiffs prayed in their complaint be and the same is hereby denied; provided, however, that the above-styled action is not hereby dismissed, but is retained and will remain pending for a reasonable time to permit the exhaustion of such State administrative and judicial remedies as may be available; there-

after, such further proceedings will be had herein as may then appear to be lawful and proper.

Done, this the 9 day of November, 1953.

RICHARD T. RIVES,
United States Circuit Judge,

SEYBOURN H. LYNNE,
United States District Judge,

H. H. GROOMS,
United States District Judge,

APPENDIX "B"

COPY OF STATE STATUTE INVOLVED

H. B. 231 5/15/53 RI RFD State Administration 6/19/53 R2 Calendar 8/4/53 R3 at length Yeas 58 Nays 17 by Messrs. Solomon, Wilson, Givhan, Butler, Summerlin, Malone (Houston), Engelhardt, Weathers, Faulk, Branyon.

A BILL TO BE ENTITLED AN ACT

To provide that any public employee who joins or participates in a labor union or labor organization shall forfeit all rights afforded him under the State Merit System, employment rights, re-employment rights, and all other rights, benefits, or privileges which he enjoys as a result of his public employment.

BE IT ENACTED BY THE LEGISLATURE OF ALABAMA:

Section 1. As used in this act the term "labor union or labor organization" means any organization of any kind, in which employees participate for the purpose of dealing with one or more employers concerning grievances, labor disputes, wages, rates of pay, hours of employment, or conditions of work; and the term "public employee" means any person whose compensation is derived in whole or in part from the State, or any agency, board, bureau, commission or institution thereof.

Section 2. Any public employee who joins or participates in a labor union or labor organization, or who remains a member of, or continues to participate in, a labor union or labor organization thirty days after the effective date of this act, shall forfeit all rights afforded him under the State Merit System, employment rights, re-employment rights, and other rights, benefits, or privileges which he enjoys as a result of his public employment.

Section 3. This act shall not apply to persons employed as teachers by any county or city board of education or trade schools or institutions of higher learning, nor shall it apply to those employees of the State Docks Board referred to in Title 38, Section 17, of the Code of Alabama, 1940, nor shall it apply to employees of cities or counties.

Section 4. Any public employee who prior to the passage of this act or to his public employment belonged to a labor union or labor organization and as a result thereof has acquired insurance benefits or any other financial benefits may continue to participate in such labor union or labor organization to the extent that he shall not lose any benefits thus acquired.

Section 5. The provisions of this act are severable. If any part of the act is declared invalid or unconstitutional, such declaration shall not effect the part which remains.

Section 6. All laws or parts of laws which conflict with this act are repealed.

Section 7. This act shall become effective immediately upon its passage and approval by the Governor, or upon its otherwise becoming a law.

13

FILED
DEC 23 1953
HAROLD B. WILLEY, Clerk

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1953

No. 505

GOVERNMENT AND CIVIC EMPLOYEES ORGANIZING COMMITTEE, C. I. O., AN UNINCORPORATED ASSOCIATION, E. J. HABSHEY,

Appellants,

vs.

S. F. WINDSOR, FELIX L. PARSONS, J. T. THROWER, WILLIAM K. THAMES, MAURY A. McWILLIAMS AND R. P. McREE.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ALABAMA

STATEMENT OPPOSING JURISDICTION AND MOTION TO DISMISS OR AFFIRM

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IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA,
SOUTHERN DIVISION

GOVERNMENT AND CIVIC EMPLOYEES ORGANIZING COMMITTEE, C. I. O., AN UNINCORPORATED ASSOCIATION, E. J. HABSHEY,

Plaintiffs (Appellants),

vs.

S. F. WINDSOR, FELIX L. PARSONS, J. T. THROWER, WILLIAM K. THAMES, MAURY A. McWILLIAMS AND R. P. McREE.

STATEMENT OPPOSING JURISDICTION AND MOTION TO DISMISS OR AFFIRM

Appellees, Windsor, Parsons, Thrower, Thames, McWilliams and McRee, pursuant to Rule 12(3) of the Rules of the Supreme Court of the United States, file with the Clerk of this Court, now possessed of the record of the proceedings in this cause, their statement in opposition to appellants' statement as to jurisdiction herein, and include in their opposing statement their motion to dismiss or affirm.

I. Statement of Issues on Appeal

Appellants brought a civil action in a district court of three judges under the Civil Rights Act (8 U. S. C., Section 43), seeking injunctive and declaratory relief, and invoking the jurisdiction of the three-judge court under Title 28, U. S. C. A., 1331, 1343, 2201 and 2284. Appellants sought

to restrain the enforcement, operation and execution of a statute of the State of Alabama (Act No. 720, Acts of 1953), referred to as the "Solomon Act," and to secure a judicial declaration that the statute violated the Fourteenth Amendment of the United States Constitution.

The "Solomon Act" proscribes membership or participation, by employees of the State of Alabama, in "labor union(s)" or "labor organization(s)," as defined, as a condition of enjoyment of rights under the Alabama State Merit System. The Act, in Section 1, defines a "labor union or labor organization" as "any organization of any kind, in which employees participate *for the purpose of* dealing with one or more employers concerning grievances, labor disputes, wages, rates of pay, hours of employment, or conditions of work." "Public employee(s)" are persons "whose compensation is derived in whole or in part from the State, or any agency, board, bureau, commission or institution thereof," with certain exceptions contained in the Act.

The district court, in its decree, and accompanying opinion of November 9, 1953, declined to exercise jurisdiction in this case. The district court, exercising its equitable discretion, decided that this case was a proper one for invoking the doctrine of abstention. The court found that the constitutionality of an Act involving "an important area of State administration" and proclaiming "a broad legislative policy as to such administration" was drawn in question; that the act was judicially and administratively undefined in Alabama; that appellants had not exhausted available State administrative and judicial remedies; and that an unnecessary decision of constitutional questions as well as unnecessary conflict with State administration and policy might be avoided by withholding jurisdiction. The district court did not dismiss the action, however,

but retained it "for a reasonable time to permit the exhaustion of such State administrative and judicial remedies as may be available; thereafter, such further proceedings will be had herein as may then appear to be lawful and proper."

Prior to the taking of this appeal, appellant union filed in the Circuit Court of Jefferson County, Alabama, a complaint seeking to enjoin the enforcement and operation of the "Solomon Act," as well as a declaration as to its validity. That State action is now pending. Copy of this complaint is appended hereto.

Appellants have attempted to present questions going to the constitutionality of the "Solomon Act." Since the district court withheld an exercise of jurisdiction, and hence a constitutional decision, these questions are not properly before the Supreme Court.[1]

The issues on appeal are these: (1) Did the district court correctly abstain from exercising jurisdiction in this case and retain the action for a reasonable time to enable appellants to exhaust available administrative and judicial remedies in Alabama? (2) Since the district court retained the action for "further proceedings" after the appellants should have resorted to their State remedies, is there a denial of an interlocutory or permanent injunction within the meaning of Title 28, U. S. C. A., Section 1253, and, therefore, does the Supreme Court have appellate jurisdiction herein? (3) Does the action brought by the appellant union in the State court to enjoin the enforcement, operation, and execution of the statute sought to be enjoined herein deprive the Supreme Court of jurisdiction to consider this appeal during the pendency of the State court action? (4) Does this State court action deprive all

[1] Of course, appellees would insist that the *Solomon* Act does not violate any provisions of the United States Constitution, if the constitutional question were involved.

Federal courts of jurisdiction in this case pending a determination of such action, by virtue of Title 28, U. S. C. A., Section 2284(5)?

II. Statement

The nature of this action has been described in the previous section of the statement. Furthermore, the statute of Alabama, the so-called "Solomon Act," sought to be enjoined on constitutional grounds, has been summarized. The defendants (appellees here) are charged, at various administrative levels, with the enforcement of the Alabama Alcoholic Beverage Control laws. Defendants (appellees) Thrower, Thames, and McWilliams are members of the Alabama Alcoholic Beverage Control Board (referred to as the Board) and are charged with the overall supervision of the administration of the Alabama Alcoholic Beverage Control Act. Defendant (appellee) McRee is Administrator of the Board, and his duties include administration of all the provisions of the beverage control act, subject to the supervision of the Board. Windsor is District Store Supervisor, and Parsons is a store manager at the State liquor store wherein Habshey is employed.

Appellants complain that these appellees, acting under color of the "Solomon Act" have threatened to discharge Habshey and to deprive him of all rights, privileges and benefits which he enjoys in his present public employment, for the sole reason that Habshey intends to remain a member and continue to participate in the appellant labor union. Both the union and Habshey allege that their rights under the United States Constitution have been infringed by the threatened actions of the defendants. They contend that if Habshey is to avoid discharge, he must withdraw from the union and thereby give up rights of speech and assembly—specifically his opportunities to attend union meetings and there to discuss and become informed upon various

problems involving his welfare, working conditions and other matters.

The union contended that the discharge of Habshey and other employees would deprive it of rights under the Federal Constitution, since its membership would be reduced and it would lose the monthly dues paid by the withdrawing members, and that it would be deprived of the alleged right to solicit members from among other State employees.

Appellees moved to dismiss the action on grounds falling into three general categories: First, that there was no jurisdiction over the subject matter; second, that even if the district court had jurisdiction over the subject matter, as a matter of equity and comity, a federal district court should abstain from exercising the jurisdiction in this case; and third, that the complaint failed to state grounds upon which relief could be granted. The district court found the following facts concerning the actions of the appellees as well as the status of the "Solomon Act," which became effective September 17, 1953:

> "No rules or regulations have been proposed or adopted interpreting or implementing the Solomon Bill. No directives or orders have been issued to supervisors, store managers, or other employees with regard to the administration of the Bill. The Board has adopted no specific policies concerning the Bill other than a general recognition of the duties to enforce all the laws of Alabama relating to the Alabama Alcoholic Beverage Control Board. Neither Habshey nor any other employee has been threatened with discharge or dismissal or deprivation of employee rights, benefits or privileges by reason of continued membership and participation in the plaintiff union. No inquiries or investigations have been made by or on behalf of the board concerning union membership. No action has been taken by the State Personnel Board or its Director whereby any employee of the Alcoholic Beverage Control Board has been dismissed from his employment or

deprived of any of his rights, benefits and privileges accorded him by reason of his public employment in the Merit System of Alabama, because of membership in any labor union. Habshey has enjoyed full Merit System status, and except to the extent that the Solomon Bill has affected his status, presently enjoys all the rights, benefits and privileges accorded under the Merit System.

"The 'forfeiture clause' by its terms was without force until thirty days after the effective date of the Bill. This action was instituted on October 7, 1953—eleven days before the expiration of such thirty-day period. No State administrative or judicial proceedings are pending and the Bill is administratively and judicially undefined."

As pointed out, the decision and judgment of the district court went no further than to withhold the exercise of jurisdiction pending exhaustion of State administrative and judicial remedies. The grounds of this decision are discussed, supra, at page 2. Further, as previously pointed out at page 2, supra, the appellant union on November 16, 1953, filed a bill for injunction and declaratory judgment in the Circuit Court of Jefferson County, Alabama, seeking to enjoin the enforcement, operation and execution of the Solomon Act as it might be applied to the union or any member thereof. Copy of this complaint is appended hereto. Appellees are defendants in this State Court action. Thus, the subject matter and parties in the State court action are the same as the subject matter and the parties of this appeal, except that Habshey is not named a plaintiff in the State court action although he comes within the scope of the injunctive relief there sought.

III. No Substantial Question Is Presented by the Attempted Appeal

Since the district court withheld an exercise of jurisdiction pending exhaustion of State remedies, and pending

a State interpretation of the "Solomon Act," necessarily there was no decision on the constitutionality of that Act for review by the Supreme Court on appeal. Although appellants have attempted to question on appeal the constitutionality of the "Solomon Act," actually only the question of the propriety of the district court action may be presented to the Supreme Court. The question for decision on appeal is whether the district court properly exercised its equitable discretion when it abstained from exercising jurisdiction in this case, retaining the action for a reasonable time to enable appellants to exhaust available administrative and judicial remedies in Alabama.

It is submitted that the district court properly invoked the doctrine of abstention, and that any question as to the correctness of the decision of that court has been definitely determined so that no substantial question is presented on this appeal. Appellants are thus not entitled to invoke the jurisdiction of the Supreme Court of the United States.

A. *Appellants Had Not Exhausted Their Administrative and Judicial Remedies in Alabama Prior to the Commencement of This Action.*

The district court quite properly required appellants to pursue their Alabama remedies prior to seeking relief from the Federal courts. Indeed, the appellant union has already resorted to the Alabama courts, attempting to raise the rights of the individual appellant as well.

Any person dismissed from a position in the State Merit System is entitled to review before the State Personnel Board (Title 55, Section 315, Code of Alabama 1940).

Further, on occasion, the courts of Alabama have reviewed the action of the appointing authority and the State Personnel Board in dismissing a Merit System employee and depriving him of his rights under the Merit System. See, e. g., *State of Alabama, ex rel. Sewell* v. *State Per-*

sonnel Board, et al., (Circuit Court of Montgomery County, September 1951), reviewing the discharge of a prison physician, Sewell, for political activities. The ruling in the Circuit Court on September 20, 1951, was not appealed to the Supreme Court of Alabama.

In *Stefanelli* v. *Minard,* 342 U. S. 117 (1951), a plaintiff, suing under 8 U. S. C. A., Section 43, sought an injunction against the use of evidence obtained by an unlawful search on the part of state police in a pending state criminal proceeding. Holding that the complaint had been properly dismissed below, the Supreme Court stated (342 U. S., at page 121):

> "This Act has given rise to differences of application here. Such differences inhere in the attempt to construe the remaining fragments of a comprehensive enactment, dismembered by partial repeal and invalidity, loosely and blindly drafted in the first instance, and drawing on the whole Constitution itself for its scope and meaning. Regardless of differences in particular cases, however, the Court's lodestar of adjudication has been that the statute 'should be construed so as to respect the proper balance between the States and the federal government in law enforcement.' *Screws* v. *United States,* 325 U. S. 91, 108."

An early exposition of this same doctrine appears in *Prentis* v. *Atlantic Coast Line R. Co.,* 211 U. S. 210 (1908). On appeal from action of a lower Federal court enjoining a Virginia Commission from enforcing certain railway passenger rates on grounds of confiscation, the Supreme Court reversed the lower court on considerations of convenience and comity and ordered dismissal of the suit in the lower Federal court because the railroad had not pursued its remedies of appeal to the Virginia courts.

Appellants argue that the "Solomon Act" deprives one of his rights of appeal to the State Personnel Board under

Title 55, Section 315, supra. There is nothing to indicate this. For example, Title 55, Section 317, Code of Alabama 1940, prohibits various sorts of political activity on the part of Merit System employees. This section concludes with the sentence: "Any officer or employee in the classified service who violates any of the foregoing provisions of this section shall forfeit his office or position." But the use of the phrase "shall forfeit" has never been construed to mean that a person engaging in political activities had no right to be heard by the State Personnel Board, and indeed, in the *Sewell* case, *supra*, by the courts of Alabama on the question of whether or not he should be discharged from his Merit System position because of such political activity. It is submitted that the use of the phrase "shall forfeit" in Section 2 of the "Solomon Act" must be construed in the same manner, and that plaintiff must pursue his administrative and judicial remedies in Alabama before coming to the Federal courts.

B. *The District Court Properly Abstained from Exercising Jurisdiction*

The district court, and now the Supreme Court, have been asked to construe, nullify, and enjoin action under a new statute of Alabama—a statute which purports to regulate the conduct of all State employees, with certain exceptions, relating to membership in labor unions. Obviously, the statute concerns a vastly important area of State administration and enunciates a broad legislative policy in this regard. The statute, scarcely a month old at the time of the district court hearing, is unconstrued in Alabama—either by administrative agencies or the courts. It is difficult to conceive of a more appropriate case for the application of the well-established principle that where important questions of State administration are involved, where the

complaining party has not sought State court relief, where the complaining party seeks to upset apparent State policy, and where the constitutionality of a judicially undefined State Statute is drawn in question, Federal courts should decline to exercise jurisdiction and leave the matter to the State courts for adjudication.

The opinion of the district court disposes of appellants' contention that the "Solomon Act" may be construed in only one way, and that there is no need for State court construction.

> "The Solomon Bill concerns an important area of State administration and proclaims a broad legislative policy as to such administration. As to employees working for the State, there can hardly be any dispute that the settlement of grievances, labor disputes, wages, rates of pay, hours of employment, and conditions of work are matters for the State government to be performed through its legislative and executive departments, and are not matters for collective bargaining to be participated in by a labor union or labor organization. Section 1 of the Act defines 'labor union or labor organization,' and, as so defined, the Act could well be construed by the state courts simply as prohibiting a public employee from being a member of or participating in such an organization for the purpose of collective bargaining with the State and, as so construed, meet the challenge of unconstitutionality."

The recent cases of *Alabama Public Service Commission* v. *Southern Railway*, 341 U. S. 341 (1951), and *Burford* v. *Sun Oil Co.*, 319 U. S. 315 (1943), support the district court. In both cases, the Supreme Court answered affirmatively the question: "Assuming that the federal court had jurisdiction, should it, as a matter of sound equitable discretion, have declined to exercise that jurisdiction here?" (341 U. S., at page 345). Because of the importance of these decisions, a brief discussion of the *Southern* case might be helpful.

Southern Railway petitioned the Alabama Public Service Commission for permission to discontinue service of its trains operating daily between Tuscumbia, Alabama, and the Tennessee line, en route to Chattanooga, Tennessee. The Alabama statutes forbade discontinuance of any portion of intrastate railroad service to the public without application for permission to the Alabama Commission and the granting of a permit to discontinue. Title 48, Sections 35 and 106, Code of Alabama 1940. The railroad contended that public need for the service had declined greatly, that other modes of transportation were available to accommodate the public, and that its direct operating expenses were considerably in excess of its revenues from the line in question. After having conducted a public hearing in one of the communities served, the Commission concluded that there was a public need for the railroad service and that Southern had not adopted all feasible economy measures. Permission to discontinue the line was denied.

Instead of pursuing its remedies in the Alabama courts, (see Title 48, Sections 79-94, Code of Alabama 1940) Southern filed a complaint in the Federal district court alleging diversity of citizenship and the presence of a Federal question. The Federal question asserted arose out of the railroad's contention that required continuance of operation of the line at a loss constituted a confiscation of its property in violation of the Fourteenth Amendment of the Federal Constitution. Southern prayed temporary and permanent injunctive relief against the Commission and appropriate State officials enjoining them from proceeding against Southern because of discontinuance of the rail service.

A three judge Federal district court assumed jurisdiction of the cause; heard evidence; found confiscation and an absence of public necessity for the service; held the Commission order void; and permanently enjoined the Commission and the State officials from taking any steps to enforce

the Commission order or the penalty provisions of the Alabama Code. *Southern R. Co.* v. *Alabama Public Service Commission,* 91 F. Supp. 980 (M. D. Ala. 1950).

On appeal, the Supreme Court reversed the district court, holding that even though that court had jurisdiction, the case was not a proper one for the exercise of jurisdiction. (341 U. S. 341.) The Court commented:

> "Appellee takes the position, adopted by the court below, that whenever a plaintiff can show irreparable loss caused by an allegedly invalid state administrative order ripe for judicial review in the state courts the presence of diversity of citizenship or a federal question opens the federal courts to litigation as to the validity of that order, at least so long as no action involving the same subject matter is actually pending in the state courts. But, it by no means follows from the fact of district court jurisdiction that such jurisdiction must be exercised in this case." (341 U. S. at page 344f.)

The *Southern* case is a culmination of judicially conceived solutions to the vexing problem of how to limit the authority of the lower Federal courts where matters predominantly of State concern are at issue. The Supreme Court found that equitable intervention in the case to enjoin the enforcement of the State administrative order had not exhibited the "scrupulous regard for the rightful independence of State governments which should at all times actuate the Federal courts." (Quoted 341 U. S. at page 349.) Ordinary rules of comity had to be invoked to avoid useless friction with Alabama administrative policies. And Southern was told to pursue its remedies in the State courts. It is noteworthy that the *Southern* case did not involve a new or undefined State statute. *A fortiori* it controls the case at bar.

The *Southern* decision leaves to State courts, with safe-

guards discussed, the role of helping to fashion comprehensive State administrative programs. The Supreme Court was unwilling to allow lower Federal courts to become architects of local domestic policy.

The doctrine of the *Southern* case is, of course, applicable in Federal actions arising under the Civil Rights Act. (8 U. S. C. A., Secs. 43 and 47.) See, e.g., *Stefanelli* v. *Minard*, 342 U. S. 117 (1951); *Peay* v. *Cox*, 190 F. 2d 123 (5th Cir. 1951); *Cooper* v. *Hutchinson*, 184 F. 2d 119 (3rd Cir. 1950); *Cobb* v. *City of Malden*, 202 F. 2d 701 (1st Cir. 1953).

The newness of the Solomon Act, and the fact that it is judicially and administratively undefined, were additional reasons for Federal abstention in this case. The district court decision is supported by another line of Supreme Court cases holding that abstention is required where the constitutionality of an ill-defined State statute is drawn in question.

A leading decision to this effect is *Railroad Commission of Texas* v. *Pullman Co.*, 312 U. S. 496 (1941). The Railroad Commission of Texas required that no sleeping cars operate in Texas unless in charge continuously of an employee having the rank and position of Pullman conductor. Formerly, where traffic was light, porters had supervised sleepers. The company attacked the order of the Federal district court urging violation of the equal protection clause. The porters intervened, insisting primarily that they had been discriminated against because of race. A three judge court granted the injunction, basing its decision on Texas law. The Supreme Court reversed, and remanded with instructions to hold the bill pending determination of proceedings to be brought with reasonable promptness in the Texas courts.

The court maintained that a Federal decision interpret-

ing Texas law would be a guess displaceable by later State adjudication. Thus, sound equitable discretion dictated avoidance of a wasted decision.

The *Pullman* doctrine has been applied extensively in cases where Federal courts have been asked to decide questions involving interpretation of State law. In *Chicago* v. *Fieldcrest Dairies*, 316 U. S. 168 (1942), a Chicago ordinance required that milk be sold in "standard bottles." Plaintiff had been refused a permit to sell milk in paper containers. The Supreme Court held that a Federal court should not have decided either the question of whether paper containers were "standard milk bottles" or whether the city could prohibit sale of milk in paper containers, until the State courts had considered the case.

Connecticut imposed a franchise tax on corporations carrying on business within the State, or having the right to do so. A Missouri corporation, engaged exclusively in interstate commerce but maintaining two leased terminals in Connecticut for the purpose of carrying on interstate business, sought an injunction against the enforcement of the tax against it, urging commerce clause and due process objections. The Federal district court had held the tax inapplicable to plaintiff. The Court of Appeals held that plaintiff came within the act, but that it was not unconstitutional. The Supreme Court, in *Spector Motor Co.* v. *McLaughlin*, 323 U. S. 101 (1944) vacated the holding of the Court of Appeals and remanded to the district court with instructions to hold the case pending prompt determination of proceedings to be brought in the Connecticut courts. The Supreme Court reasoned that if the act did not apply to the plaintiff, a constitutional decision would be unnecessary.

State constitutional provisions have received similar treatment under the "Pullman rule." The case of *A. F. of*

L. v. *Watson*, 327 U. S. 582 (1946), concerned proceedings to test the Federal constitutionality of a Florida constitutional provision that ". . . (the) right of persons to work shall not be denied or abridged on account of membership or non-membership in any labor union, or labor organization; . . ." A three judge district court, in a suit to enjoin enforcement of the provision, granted a temporary restraining order without determining whether there was equity in the bill of complaint, or whether the case should be held without decision until the Florida courts had spoken. The district court held the Florida provision valid, and dismissed the complaint. The Supreme Court reversed with directions to retain the case pending State court determination, reiterating the *Pullman* doctrine.

Recently injunctive relief was sought in a three judge district court against a South Carolina statute regulating fisheries and shrimping industries. The attack was on constitutional grounds. The Supreme Court, *per curiam*, held that the district court had erroneously considered the case where no State interpretation existed, and remanded with directions to retain pending State court adjudication. *Shipman* v. *DuPre*, 339 U. S. 321 (1950).

Clearly, the doctrine of abstention where ill-defined State statutory and constitutional provisions are involved, is so solidly established that no substantial question concerning the basis of the district court decision exists.

The doctrine of abstention is controlling *a fortiori* where the appellant union at the time it appeals from the district court has brought in the State court an action seeking identical relief concerning the same State statute. The State court action, as indicated by the complaint attached thereto, seeks to enjoin the enforcement, execution and operation of the same State statute drawn in question in the Federal proceedings at bar.

If an action were pending in the State courts to enforce the Solomon Act, and if the State court had stayed proceedings under the Act pending a determination in that court, clearly the provisions of 28 U. S. C. A., Section 2284(5) would require abstention of federal jurisdiction. The doctrine of the *Pullman* case (discussed in Section III, *supra*) is a judicially devised method of effecting a limited Federal stay to permit State adjudication of undecided local questions which might render unnecessary a decision of Federal questions. "(E)ven where the statute does not require the three-judge proceeding to be stayed, due to the state's failure to set up a procedure that meets the requirement of the statutory provision (i.e., Section 2284(5) supra), the Court in *Railroad Commission of Texas* v. *Pullman Co.* evolved a general rule for a limited stay." Moore, *Commentary on the U. S. Judicial Code*, pp. 130 f. (1949). (Parenthesis added.)

Since there is now a State proceeding, at the voluntary instigation of appellant union prior to the taking of this appeal, the Supreme Court, it is respectfully submitted, should decline to exercise jurisdiction of this appeal even as it would stay its hand pending State court adjudication if the requirements of Section 2284(5) had been met. In so doing, the Supreme Court would be following the precedent of *Gilchrist* v. *Interborough Rapid Transit Co.*, 279 U. S. 159 (1929).

IV. The Order from Which This Appeal Is Attempted Is Not an "Order" Which Will Support an Appeal

Appellants attempt this appeal pursuant to 28 U. S. C. A., Section 1253. This section provides:

> "Except as otherwise provided by law, any party may appeal to the Supreme Court from an order granting or denying, after notice and hearing, an interlocu-

tory or permanent injunction in any civil action, suit or proceeding required by any Act of Congress to be heard and determined by a district court of three judges."

It is submitted that the instant order of the district court, merely withholding an exercise of jurisdiction—staying its hand pending adjudication in the State courts, is not an "order granting or denying . . . an interlocutory or permanent injunction" within the meaning of Section 1253. Thus, the Supreme Court has no jurisdiction over this attempted appeal.

While it is true that the sort of final judgment required by 28 U. S. C. A., Section 1257 is not a prerequisite to review under Section 1253, (see, *United States* v. *U. S. Smelting Co.*, 339 U. S. 186, 199 (1950)), nevertheless, it is submitted that something more decisive than the district court order at bar is essential to appellate jurisdiction under Section 1253. The instant order not only is nothing more than a declination to act, but in addition retains the action for further proceedings following reasonably prompt State court proceedings. If appellants have any remedy at all, it would seem that something akin to mandamus—certainly not appeal—is appropriate.

There is a controlling analogy in the remand cases. A district court order, remanding a case to the State court from which it was removed, is not reviewable. 28 U. S. C. A., Section 1447(d); *Aetna Casualty Co.* v. *Flowers*, 330 U. S. 464, 466-7 (1947). This code section, and its predecessor, "were designed to limit possible review of orders remanding causes and thus prevent delay." *Kloeb* v. *Armour & Co.*, 311 U. S. 199, 204 (1940). Though there is now a statute on the subject, even before the series of legislative enactments on the question of reviewability of remand orders, the Supreme Court had decided that these

orders were not reviewable. In *Chicago and Alton R. R. Co.* v. *Wiswall,* 23 Wall. 507, 508 (1875), the Court stated:

> "The order of the circuit court remanding the cause to the state court is not a 'final judgment' in the action, but a refusal to hear and decide. The remedy in such a case is by mandamus to compel action, and not by writ of error to review what has been done."

See also, the statement of the Court in *Ex parte The Pennsylvania Co.,* 137 U. S. 451, 453 (1890): "(A)n order to remand was not a final judgment, and no writ of error would lie."

Chief Justice Stone, in *United States* v. *Rice,* 327 U. S. 742, 748-9 (1946) explained the judicial and legislative history of the reviewability of remand orders:

> "Before the Judiciary Act of March 3, 1875 . . . an order of remand was deemed to be not reviewable by appeal or writ of error because the order was not final. *Chicago & A. R. Co.* v. *Wiswall* . . . ; *Re Pennsylvania Co.,* . . . But Section 5 of the Act of 1875 expressly authorized the review of an order of remand by appeal or writ of error 'in any suit' removed from a state court. This provision was repealed by Section 6 of the Act of 1887, supra, and to make doubly certain, Section 2, supra, specifically prohibited appeals with the added direction that the order of remand should be 'immediately carried into execution.' It thus appears that when the Act of 1926 was passed, the practice in removal cases was, as it had been established from the beginning, save for a brief interval under Section 5 of the Act of 1875, that an order of remand was not appealable, and it is also clear that in 1926, as for forty years before, Section 2 of the Act of 1887 required the remand of 'any' removed cause 'to be immediately carried into execution.' "

It is submitted, that the district court "order," abstaining from the exercise of jurisdiction pending state court pro-

ceedings, is not an appealable "order" within the scope of Section 1253.

Since the district court abstained from exercising jurisdiction in this case, of necessity it did not reach questions raised by appellees in that court concerning the justiciability of the controversy, and concerning the failure of appellants to state a claim upon which relief could be granted since appellants' constitutional rights had not been abridged by the "Solomon Act."

The issue on this appeal is limited to the propriety of the exercise of judicial discretion in the district court, so far as the correctness of that court's judgment is concerned. See, *Alabama* v. *United States*, 279 U. S. 229, 231 (1929):

> "(T)he doctrine to be followed in reviewing such an order applies in the case of an order of a court of three judges denying an interlocutory injunction does not admit of doubt . . . The duty of this Court, therefore, upon an appeal from such an order, at least generally, is not to decide the merits but simply to determine whether the discretion of the court below has been abused."

The judgment of the district court is founded on such a solid and definite line of judicial precedent that no substantial question is presented by this appeal entitling appellants to invoke the jurisdiction of the Supreme Court of the United States. The attempted appeal does not conform to the requirements of 28 U. S. C. A., Section 1253. The pendency of the state court action militates against the exercise of appellate jurisdiction herein.

WHEREFORE, appellees respectfully move that the within appeal be dismissed or that the judgment and decree of the United States District Court for the Northern District of

Alabama, Southern Division, entered herein on November 9, 1953, be affirmed.

Respectfully submitted,

SI GARRETT,
Attorney General.

W. ROLAND NACHMAN, JR.,
Assistant Attorney General,

JESSE M. WILLIAMS,
Counsel for Appellees.

APPENDIX "A"

BILL OF COMPLAINT AND PETITION FOR DECLARATORY JUDGMENT FILED IN THE CIRCUIT COURT FOR THE TENTH JUDICIAL CIRCUIT OF ALABAMA

No. 92,704

GOVERNMENT & CIVIC EMPLOYEES ORGANIZING COMMITTEE, CIO, AN UNINCORPORATED ASSOCIATION, COMPLAINANT

vs.

S. F. WINDSOR; FELIX L. PARSONS; J. T. THROWER; WILLIAM K. THAMES; MAURY A. MCWILLIAMS; AND R. P. MCREE, RESPONDENTS

To the Honorable Judges of the Tenth Judicial Circuit of Alabama, in Equity:

The bill of complaint and petition for declaratory judgment of Government and Civic Employees Organizing Committee, CIO, an unincorporated association, against the above-named respondents respectfully shows:

1. Complainant is an unincorporated association, having its principal office in Washington, D. C. It is an affiliate of the Congress of Industrial Organizations and is engaged in organizing and recruiting members among, and the representation of, civilian employees employed by one or more public bodies and social agencies, public or private. Complainant exists and its members participate in complainant for the purpose, among other things, of dealing with such employers concerning grievances, labor disputes, wages, rates of pay, hours of employment, conditions of work and other related matters in order to improve, by negotiation, the conditions of employment for and the quality of service rendered by such employees, or to effect such improvement by legislation, or other legitimate means. Complainant derives substantially all of its income from the dues paid by its members who are employed either by governmental bodies or by social agencies, public or private. Complainant has had, until the recent enactment of the Alabama Statute

(Exhibit "A" hereto,) several hundred members who are employees of the Alabama Alcoholic Beverage Control Board (hereinafter referred to as the "Board".) These members included employees of the Board working at Alabama Liquor Store No. 75, located at 2620 31st Avenue, North, in Birmingham, Alabama. At least one employee of said store still remains a member.

2. The objects of the Congress of Industrial Organizations as set forth in its Constitution include the following:

> " . . . To bring about the effective organization of working men and women of America regardless of race, creed, color or nationality, and to unite them for common action into labor unions for their mutual aid and protection.
>
> • • • • • • •
>
> " . . . To secure legislation safeguarding the economic security and social welfare of the workers of America, to protect and extend our democratic institutions and civil rights and liberties, and thus to perpetuate the cherished traditions of our democracy."

The rules governing administration of the complainant union provide:

"ARTICLE II

• • • • • • •

"Section 2. Membership in GCEOC shall not be denied by reason of sex, race, creed, color, nationality or religious belief but shall be denied to any avowed or proven fascist, communist or person advocating the overthrow of government by force and violence.

• • • • • • • •

"ARTICLE IV

OBJECTS

"First. To unite into one organization all eligible workers and to establish as soon as economically and

numerically practical an International Union of the CIO.

"Second. To increase the wages and improve the conditions of employment of our members by legislation, negotiation or other legitimate means.

"Third. To seek the maximum job security of all members and to promote the principle of advancement and promotion based on seniority and merit.

"Fourth. To secure liberal retirement plans to be fully paid for by the employer or employing governmental body.

"Fifth. To seek extension of social security, unemployment compensation, health and welfare legislation to all American workers including governmental workers and employees of non-profit institutions; to strive to liberalize and expand these benefits.

"Sixth. To cooperate with the Congress of Industrial Organizations and its affiliated International Unions and Organizing Committees to the end that all who toil shall become members of the Union of their industry for the purpose of bringing about a more secure, more abundant and happier way of life."

3. All members of complainant, upon admission to membership have pledged their honor faithfully to observe these rules.

4. (a) Respondent S. F. Windsor is District Store Supervisor of the Board in Birmingham, Alabama, and is a resident of Birmingham, Jefferson County, Alabama.

(b) Respondent Felix L. Parsons is the Store Manager of said Alabama Liquor Store, operated by the Board and is a resident of Birmingham in Jefferson County, Alabama.

(c) Respondent William K. Thames is Chairman of the Board. Respondents J. T. Thrower and Maury A. McWilliams are members of the Board. Respondent R. P. McRee is the Administrator of the Board. Each is a resident of Alabama.

(d) Respondents Windsor and Parsons are supervisory agents of the Board charged with enforcement of the laws of Alabama governing the Board's operations.

(e) Each respondent is over the age of 21 years.

5. Complainant, as indicated in paragraph 1 hereof, exists for the purpose of dealing with employers under such circumstances and in those jurisdictions in which such dealing is legitimate. Respondents have denied that complainant can legitimately deal with them under the laws of Alabama and have refused to engage in any formal dealings or negotiations with plaintiff with respect to employees of the Board. Complainant has, in accordance with the rules governing its administration abided by respondents' decision not to deal with complainant; and, has sought, after such denial and without negotiation, to assist its members in individual problems arising out of and in the course of their employment by the Board, has consulted with its members privately and in union meetings with respect to its members' rights under the State Merit System; with respect to common interests involving the welfare and working conditions of these members and other citizens of the United States, members of the Union or of other unions, working for the State of Alabama and for private employers; about and upon public affairs and public figures, economic and political issues, both local and national, and candidates for State and Federal offices; upon rights and privileges, arising under Federal legislation, such as the Social Security Act, Public Housing Acts, Price Control Acts and regulations, and the possibility of extending and giving such rights and privileges to its members and to other citizens; and about matters of Federal and State taxation, such as the form and amounts of taxation and elements of eligibility for the exercise of the right of franchise, under State and Federal laws. In sum, abiding by respondents' denial of any formal relations or dealings with complainant, and without assertion of any right to strike against the Board as employer of its members, complainant has continued to seek to increase the wages and to improve the conditions of employment of, and quality of service rendered by, its members who are employees of the Board, by legislation or other legitimate means, without negotiation.

6. Respondents are charged with the duty of enforcing all laws of the State of Alabama in so far as they affect or apply to employees of the Board. Respondents have stated

their intention to enforce against complainant and against all members of complainant union a Statute of the State of Alabama, House Bill 231, known as the "Solomon Bill" which became effective by approval of the Governor of Alabama upon September 18, 1953, a copy of which is attached hereto and made Exhibit "A" (hereinafter called the "Statute"). This Statute requires and purports to authorize the discharge of any employees of the Board who remain members of or continue to participate in certain types of organizations as defined therein. Respondents claim that complainant is a labor union or labor organization as defined therein and have acted, and are threatening to act upon that interpretation of the Statute.

7. Attached hereto as Exhibit "B" is a written reply of Respondent McRee to a wire of inquiry from members of complainant employed by the Board in Birmingham in said above store and other retail liquor stores.

8. Under such threats of the enforcement of said Act, substantially all of complainant's members employed by the Board withdrew from membership and participation. Because of respondents' acts many such members have resigned from membership and many potential members have declined to join. Complainant, as a result of said members' complying with the said Statute, as so construed by respondents, has been substantially damaged. The fruits of organizational expense in excess of several thousand dollars have been largely destroyed and complainant has been deprived of monthly dues in the amount of $2.00 each from a large number of members.

9. Respondents have failed and refused to state that their threats to enforce the Statute against complainant and its members will not be carried out. These threats have been construed, as alleged above, by complainant's members as requiring withdrawal from membership as a condition of further employment by the Board.

10. A justiciable controversy exists between complainant and respondents as to whether said Statute applies to complainant and its members, and as to whether complainant is a "labor union or labor organization" as defined therein. Substantial civil and property rights are depend-

ent upon the determinaiton of this controversy and the actions of respondents in insisting that said Statute applies to complainant and its members and in threatening to enforce, and in enforcing said Statute, against complainant and its members, have rendered a declaratory judgment of this Court necessary to protect such rights of complainant and its members.

11. Complainant denies upon information and belief that said Statute applies to it or its members or that complainant is a labor union or labor organization as defined therein, and shows that the actions taken and the threatened actions to be taken by respondents under, and respondents' construction of said Statute with respect to complainant and its members are void and without authority of law.

12. The said enforcement and threats to enforce and apply said Statute against complainant and complainant's members are causing and will continue to cause irreparable injury to complainant. Complainant is without adequate remedy at law.

WHEREFORE, PREMISES CONSIDERED, complainant prays:

1. That this Court take jurisdiction of this bill of complaint and cause proper process to issue to the respondents herein, requiring them to plead, answer or demur within the time required by law, or else suffer a decree pro confesso.

2. That this Court will issue a temporary injunction:

(a) Enjoining and restraining respondents, and all agents, servants and employees of the respondents, their successors in office or any of them from:

1. Taking any steps to effectuate and carry out the provisions of the above Statute against complainant and complainant's members.

2. Using or threatening enforcement of said Statute in any way against complainant or any member of complainant.

3. That this Court will, on final hearing, issue a permanent injunction in accordance with the foregoing prayer for temporary injunction.

4. That this Court will enter a declaratory judgment

determining the status of complainant under said Statute and adjudicating that:

1. Said Statute of the Legislature of Alabama has no application to complainant or to its members.
2. Said Statute of the Legislature of Alabama cannot be construed as affecting or applying in any way to complainant or to its members employed by said Board.
3. Complainant is not a "labor union or labor organization" as defined in said Statute.

ARTHUR J. GOLDBERG,
DAVID E. FELLER,
THOMAS E. HARRIS,
Counsel for Government & Civic Employees Organizing Committee, C. I. O.;
COOPER, MITCH & BLACK,
By JAMES W. COOPER,
Counsel for Appellants.

APPENDIX "B"

STATE STATUTE INVOLVED

H. B. 231 5/15/53 RI RFD State Administration 6/19/53 R2 Calendar 8/4/53 R3 at length Yeas 58 Nays 17 by Messrs. Solomon, Wilson, Givhan, Butler, Summerlin, Malone (Houston) Engelhardt, Weathers, Faulk, Branyon.

A BILL

TO BE ENTITLED

AN ACT

To provide that any public employee who joins or participates in a labor union or labor organization shall forfeit all rights afforded him under the State Merit System, employment rights, re-employment rights, and all other rights, benefits, or privileges which he enjoys as a result of his public employment.

Be it enacted by the Legislature of Alabama:

Section 1. As used in this act the term "labor union or labor organization" means any organization of any kind, in which employees participate for the purpose of dealing with one or more employers concerning grievances, labor disputes, wages, rates of pay, hours of employment, or conditions of work; and the term "public employee" means any person whose compensation is derived in whole or in part from the State, or any agency, board, bureau, commission or institution thereof.

Section 2. Any public employee who joins or participates in a labor union or labor organization, or who remains a member of, or continues to participate in, a labor union or labor organization thirty days after the effective date of this act, shall forfeit all rights afforded him under the State Merit System, employment rights, re-employment rights, and other rights, benefits, or privileges which he enjoys as a result of his public employment.

Section 3. This act shall not apply to persons employed as teachers by any county or city board of education or trade schools or institutions of higher learning, nor shall it apply to those employees of the State Docks Board referred to in Title 38, Section 17, of the Code of Alabama, 1940, nor shall it apply to employees of cities or counties.

Section 4. Any public employee who prior to the passage of this act or to his public employment belonged to a labor union or labor organization and as a result thereof has acquired insurance benefits or any other financial benefits may continue to participate in such labor union or labor organization to the extent that he shall not lose any benefits thus acquired.

Section 5. The provisions of this act are severable. If any part of the act is declared invalid or unconstitutional, such declaration shall not affect the part which remains.

Section 6. All laws or parts of laws which conflict with this act are repealed.

Section 7. This act shall become effective immediately upon its passage and approval by the Governor, or upon its otherwise becoming a law.

APPENDIX "C"

A Copy of a Letter Dated October 2nd, 1953, from R. P. McRee, Administrator of the Alabama Alcoholic Beverage Control Board to Mr. Neal Cockrell.

State of Alabama

Alabama Alcoholic Beverage Control Board
Montgomery 2, Alabama

R. P. McRee,
Administrator.

Board
William K. Thames, *Chairman,*
Montgomery, Alabama.
Maury A. McWilliams, *Member,*
Prattville, Alabama.
J. T. Thrower, *Member,*
Dothan, Alabama.

October 2, 1953.

Mr. Neal Cockrell,
915 Fifth Avenue, North,
Birmingham, Alabama.

Dear Sir:

This will acknowledge receipt of your telegram of September 30, which reads as follows:

> "In order that we may advise our union members employed by the Board in ABC stores here in Jefferson County please advise what enforcement steps the Board contemplates to enforce the Solomon Bill against those who intend to remain in the union your prompt reply will be most appreciated."

I have been directed by the ABC Board to inform you that the Solomon Bill will be enforced by the Board in the same manner as the ABC Act or other pertinent laws.

Yours very truly,

(S.) R. P. McRee,
Administrator.

TPM:mt

14

FILED

DEC 22 1967

JOHN F. DAVIS, CLERK

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1967

No. 14

GOVERNOR GEORGE C. WALLACE, ET AL.,

Appellants,

v.

THE COMMITTEE OF ATTORNEYS, ET AL.,

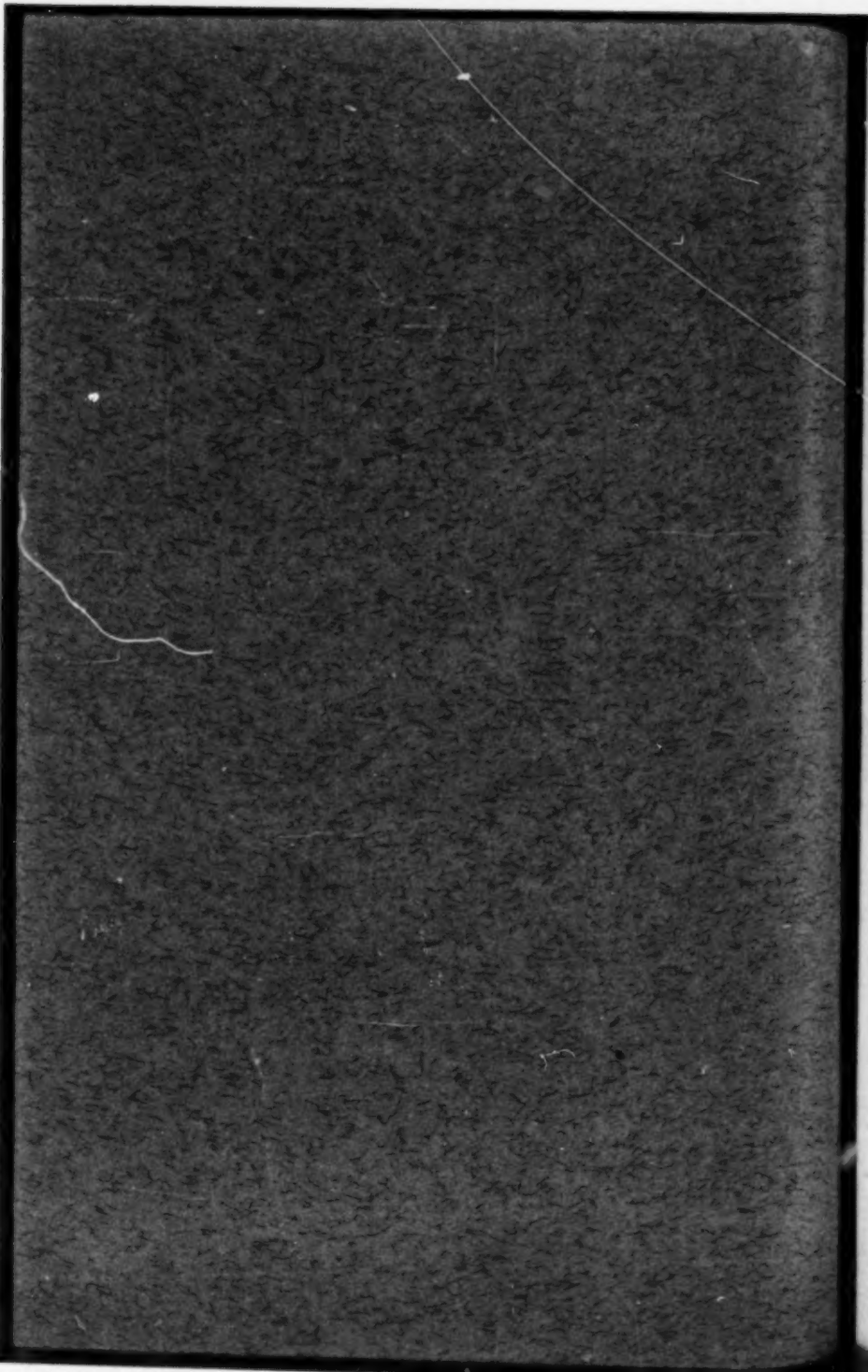
Appellees.

On Appeal from the United States District Court for the Middle District of Alabama

MOTION TO DISMISS APPEAL AND BRIEF IN SUPPORT THEREOF

Of Counsel:

Counsel for Appellees.



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IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ALABAMA SOUTHERN DIVISION

No. 7,466

GOVERNMENT AND CIVIC EMPLOYEES ORGANIZING COMMITTEE, C. I. O., AN UNINCORPORATED ASSOCIATION; E. J. HABSHEY, *Plaintiffs,*

vs.

S. F. WINDSOR, FELIX L. PARSONS, J. T. THROWER, WILLIAM K. THAMES, MAURY A. McWILLIAMS AND R. P. McREE

APPELLANTS' BRIEF IN REPLY TO MOTION TO DISMISS OR AFFIRM

In reply to Appellee's statement in opposition and motion to dismiss or affirm, appellants submit this supplemental statement in support of the jurisdiction of the Supreme Court of the United States to review the judgment of the District Court entered in this cause.

There are two basic errors in appellees' statement in opposition.

First at no prior time has the doctrine of abstention or comity been applied so as to leave a litigant helpless under the impact of challenged State legislation. Here, that has been done.

The District Court in recognition of the substantial Federal questions raised by the bill, retained jurisdiction. It refused, however, to grant relief pending suggested proceedings in the State Court for construction of the Statute. In complete disregard of the immediate and totally destructive effects of the Statute, the District Court granted no interim relief, of any kind. But, temporary relief is essential, if, indeed, it is not too late to aid at all, if plaintiffs are not to be destroyed and irreparably harmed before either this appeal is determined here or the Statute is construed by the State Courts. Need for such relief, of course, exists quite entirely apart from the question of whether the unambiguous and clear terms of the Statute permit of any further delay in the exercise of the Federal Court's equity powers.

In view of the present and very real injury to appellants, this Court—absent construction of the Statute by the State Courts—must, to the extent necessary, determine the Statute's meaning. (Cf. *Pierce* v. *Society of Sisters*, 268 U. S. 510, 535, 45 S. Ct. 571, 574.) For at the very least, appellants' rights under the Constitution should be protected by relief against enforcement of the Statute until the question of its application and meaning is ultimately determined by the State Courts. The justification for such relief is undiminished by the possibility that this Court may frame its judgment so as to conform "to the possible contingency of a decision by the State Supreme Court at variance with . . . [its own] in respect of the meaning of the Statute . . ."

Lee v. *Bickell*, 292 U. S. 415, 425, 54 S. Ct. 727, 731.

See, also:

Glenn v. *Theo Packing Co.*, 290 U. S .177, 54 S. Ct. 138;

Wald Transfer, etc. v. *Smith*, 290 U. S. 602, 54 S. Ct. 227.

Second, the District Court has extended the so-called doctrine of abstention in a manner and to a degree never contemplated by the cases which initiated that doctrine.

The authorities relied upon by the District Court, and urged by appellees, all involved situations in which State Court proceedings by the State were provided for in the challenged State legislation, or actually were in progress (e. g. *American Federation of Labor* v. *Watson*, 327 U. S. 582). Alabama's Statute does not so provide. Prosecutions under it are neither in progress, nor, indeed, possible. The terrific threat of loss of public employment rights is the sole, but devastating and self-operative weapon chosen by the Legislature. That threat alone has been sufficient virtually to destroy the Union. Thus, defendants (appellees) in confident reliance upon that threat achieve the destruction of appellant Union. And such destruction involves a complete deprivation of the rights of free association, free speech and assembly that find expression in such an organization.

Actually, appellees blow both hot and cold; they clearly demonstrated that they oppose a construction of the Statute by the Courts of Alabama. A declaratory judgment action has, pursuant to the District Court's admonition, been promptly filed by the appellant Union in the Circuit Court, Tenth Judicial Circuit of Alabama. To that State Court action, however, appellees (as respondents there) have responded with a dilatory plea in abatement. The plea (now under advisement) urges the State Court not to act because of the pendency of the present appeal proceedings in this Court. (A copy of that plea is attached.)

In the hearing held by the District Court below, appellees were asked by that Court whether the Union plaintiff could obtain relief in the Courts of Alabama. To that inquiry, appellees assured the District Court that the judi-

cial system of Alabama would be available to protect the Union's rights. On the contrary, however, their plea in abatement, filed in the Alabama Court, goes so far as to urge that the declaratory judgment action of the Union against appellees (respondents there) must be dismissed, under the law of Alabama, as a suit against the State.

Appellees' position in the State Court hardly accords with the basic premise of the so-called doctrine of abstention and comity that appropriate judicial remedies are available in the Courts of the State.

Appellants have undeniably raised what are unmistakably serious constitutional questions. Even the District Court, by refusing to dismiss the bill recognized that fact. Yet, appellees' respective positions here and in the Alabama Court add up to an assertion that no judicial relief anywhere, by State or Federal Court, should be granted. To dismiss this appeal would in effect be to agree with appellees that basic Constitutional rights of the sort set forth in the bill of complaint exist in limbo.

Therefore, appellants respectfully reiterate that the Supreme Court of the United States has jurisdiction of this appeal.

Respectfully submitted,

ARTHUR J. GOLDBERG,
DAVID E. FELLER,
THOMAS E. HARRIS,
Counsel for Government and Civic Employees Organizing Committee, C. I. O.;

COOPER, MITCH & BLACK,
By JEROME A. COOPER,
Counsel for Appellants.

APPENDIX

CIRCUIT COURT, TENTH JUDICIAL CIRCUIT OF ALABAMA

In Equity No. 92704

GOVERNMENT & CIVIC EMPLOYEES ORGANIZING COMMITTEE, C. I. O., an Unincorporated Association, *Complainant*,

v.

S. F. WINDSOR, FELIX L. PARSONS, J. T. THROWER, WILLIAM K. THAMES, MAURY A. MCWILLIAMS, and R. P. MCREE, *Respondents*

PLEAS IN ABATEMENT

Come S. F. Windsor, Felix L. Parsons, J. T. Thrower, William K. Thames, Maury A. McWilliams, and R. P. McRee, respondents, in the above-styled cause, by their attorneys, and appearing specially for the purpose of filing the following pleas in abatement, and for no other purpose, plead in abatement to the bill of complaint and petition for declaratory judgment filed in this cause and to each paragraph thereof as follows, separately and severally, and move the court to abate this suit and not allow it to proceed:

1. That complainant union, together with one Habshey, a member of complainant union, and an employee of the Alabama Alcoholic Beverage Control Board, filed an action against respondents, and each of them, in the United States District Court for the Northern District of Alabama, Southern Division, seeking to enjoin respondents from attempting to enforce or execute in any manner, or through agents or subordinates, Act No. 720, Acts of Alabama 1953, the so-called "Solomon Act", as respondents might apply that act to complainant union or any of its members. That on November 9, 1953, the said United States District Court, consisting of three judges, following a hearing, denied the relief prayed for in that action, but retained the action "for a reasonable time to permit the exhaustion of such State administrative and judicial remedies as may be available;

thereafter, such further proceedings will be had herein as may then appear to be lawful and proper." That on November 16, 1953, complainant filed the instant bill and petition in this Court against the respondents herein, and each of them, seeking to—enjoin respondents from attempting to enforce or execute in any manner, or through agents or subordinates, the same so-called "Solomon Act," as respondents might apply that Act to complainant union or any of its members. That on November 18, 1953, complainant union, together with its member, the said Habshey, filed with the said United States District Court papers pursuant to perfecting an appeal from the order, judgment and decree of that court of November 9, 1953, to the Supreme Court of the United States praying for reversal of this order, judgment and decree. That said appeal to the Supreme Court of the United States has not been acted upon and is still pending and undetermined. That by virtue of said appeal there is pending in the federal courts a suit by complainant against respondents, and each of them, involving the same cause of action and seeking the same relief as the suit before this Honorable Court brought by complainant against respondents. That the pendency of such a suit in the federal courts is ground for abatement of the instant suit against respondents.

2. That indispensable parties complainant have not been joined in this suit in that no members of complainant union, who have claims and interests which would be affected by the declaration and relief sought herein, are parties complainant hereto. That the absence of these necessary and indispensable parties deprives this court of jurisdiction to adjudicate this cause.

3. That complainant union has no standing to sue, it appearing that the so-called "Solomon Act" affects public employees and not labor unions, and no controversy exists between complainant and respondents.

4. That respondents Windsor and Parsons are not "material defendants" within the meaning of Title 7, Section 294, Code of Alabama 1940. That respondents Thames, Thrower, McWilliams, and McRee are "material defendants" within the meaning of that section. That at the time

of the filing of the bill of complaint in this cause, respondents Thames, Thrower, McWilliams and McRee were not, and have not been since the filing of said bill of complaint, residents of Jefferson County, Alabama. That at the time of the filing of this bill of complaint, and ever since that time, respondents Thames and McRee have been and are residents of Montgomery County, Alabama; respondent Thrower has been and is a resident of Houston County, Alabama; and respondent McWilliams has been and is a resident of Autauga County, Alabama. That the appropriate venue of this cause is not in Jefferson County, Alabama.

5. That this cause constitutes a suit against the State of Alabama over which this Court has no jurisdiction by virtue of Section 14 of the Constitution of Alabama 1901.

6. That no real, actual, substantial, or justiciable controversy exists between complainant and respondents sufficient to confer jurisdiction on this court to render a declaratory judgment. That complainant seeks merely an advisory and hypothetical construction of an act of the Alabama Legislature, Act No. 720, Acts of 1953, the so-called "Solomon Act".

7. That complainant union has no standing to sue on behalf of its members.

8. That the court has no jurisdiction to render a declaratory judgment, there being no allegations that no other remedies are not available to complainant.

9. That it affirmatively appears from the verified complaint that no injury, or threat of injury, will be incurred by complainant, or by any member of complainant employed by the Alabama Alcoholic Beverage Control Board, or by any other member of complainant by reason of actions of any of the respondents discharging such members and employees or depriving them of their rights under the State Merit System, employment rights, reemployment rights, and all other rights, benefits or privileges enjoyed by them in their present public employment, because of membership in and continued membership and participation in the complainant union on the part of these members and employees.

10. That if for any reason any member of complainant is discharged from his employment with the Alabama Alco-

holic Beverage Control Board, such member has administrative remedies of appeal pursuant to the Alabama Merit System Act, and particularly Title 55, Section 315, Code of Alabama 1940; but that no member of complainant so employed has attempted to utilize these remedies thus accorded prior to the bringing of this suit; nor has complainant union sought administrative remedies available.

WHEREFORE, on the basis of the foregoing pleas, and each of them, respondents say that the Circuit Court of Jefferson County, Alabama (the Circuit Court of the Tenth Judicial Circuit of Alabama), in Equity, is without jurisdiction to try and determine this cause, and that this cause should be abated, and respondents pray the judgment of this Honorable Court whether complainant should be allowed further to maintain this suit.

(S.) S. GARRETT,
Attorney General;

(S.) M. ROLAND NACHMAN, JR.,
Assistant Attorney General;

JESSE W. WILLIAMS,
Montgomery, Alabama,
Attorneys for Respondents.

STATE OF ALABAMA,
—— *County:*

Before me, —— ——, a Notary Public in and for —— County, Alabama, personally appeared R. P. McRee, one of the defendants in the above-styled cause, who, being by me first duly sworn, says, on oath, that the facts set forth in each of the foregoing pleas are true and correct.

—— ——.

Sworn to and subscribed before me this — day of November, 1953.

—— ——,
Notary Public,
—— *County, Alabama.*